Prior to the trial, plaintiff Gorsuch filed a motion under Civil Rule 39(a)(2) asking the district court to hold that the defendants in this stockholder's derivative action were not entitled to a jury trial. (R. 216). Just prior to the commencement of the trial, Judge Boldt ruled that he would reserve decision on the motion, and would empanel a jury and treat its verdicts as advisory if he later granted the motion. (R. 392-393).

Subject to this reserved decision and at the close of all of the evidence, plaintiff moved for a directed verdict because both the liability of the defendants and the amount of damages were established as a matter of law. (R. 1271). The district court denied the motion, but specifically reserved the right to rule later under Rule 50(b). (R. 1271). Thereupon the district court submitted the case to the jury, which returned verdicts of $20,000 each against Sabo, Pegram, and Landoe, and verdicts in favor of the Arizona defendants, DePinto and Duhame. (R. 304). Within four days after the return of the jury verdicts, plaintiff moved the district court to reject the jury verdicts in accordance with his previous motion under Civil Rule 39(a)(2) and the court's reserved decision thereon because the defendants were not entitled to a com-

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which were taken. American also took $6,794.19 in cash from United on that same date. (R. 764-766, 768-769; Exhibit 47). The $308,000 and the $6,794.19 made up the total of $314,794.19 loss of October 18, 1957 sustained by United. When Kelly received the $308,000 in specific assets (the cash, bonds, and mortgages), he paid federal income tax on the full $308,000 during 1957. (R. 458, 460; Exhibit 83). This evidence of the fair market value of the $308,000 in cash, bonds, and mortgages, was not contradicted by any evidence, and thus the $308,000 plus the $6,794.19 of cash taken stands as the loss sustained by United.

mon law jury trial in a stockholder's derivative action; and, in the alternative, for judgment notwithstanding the verdict in accordance with his previous motion for a directed verdict, should the district court rule that the defendants were entitled to a common law jury trial. (R. 306-310).

Plaintiff made no motion for a new trial.

The district court in a memorandum opinion (App. A, infra, pp. 1a-9a), ruled:

(1) that the defendants were not entitled to a common law jury trial in this stockholder's derivative suit, granted plaintiff's motion previously filed pursuant to Civil Rule 39(a)(2), treated the jury verdicts as advisory only, rejected the jury verdicts on the breech of fiduciary duty issue, the negligence issue, and damages, and made findings of fact and conclusions of law for plaintiff;

(2) that, alternatively proceeding on the assumption the defendants were entitled to a jury trial, granted plaintiff's motion for judgment notwithstanding the verdict under Rule 50(b).

The district court stated its reasons for granting plaintiff's motion for judgment notwithstanding the verdict under Rule 50(b) as follows:

(1) "It is impossible to discern any rational basis for these verdicts, in fact or in law, either as to the amount awarded plaintiff, or as to the defendants found liable whether considered in relation to plaintiff or in relation to defendants found not liable. In these circumstances, not only are the verdicts against the weight of the evidence but *they are not supported by any evidence whatever* and they are not justified

by any legal principle." (Emphasis supplied) (App. A, infra, p. 1a)

(2) "Whether or not on timely request the case be triable by jury as a matter of right, in my opinion there was no substantial issue of fact raised by the evidence or supported by any principle of law whereby any of the defendants DePinto, Duhame, Niesz, Sabo, Pegram and Landoe can escape a finding of breach of fiduciary duty and negligence proximately causing and contributing to the wrongful loss to United Security Life of corporate assets to the damage of the corporation in a minimum of $314,794.19." (App. A, infra, p. 4a)

(3) "In my judgment the evidence overwhelmingly establishes *without a scintilla of evidence to the contrary*, that each and all of the individual defendants, including those above named, were *grossly* negligent in every particular of the duties chargeable to them as corporate directors with respect of the transactions resulting in the loss referred to . . . the evidence as a whole confirms such finding; and there was no substantial evidence raising a fact issue to the contrary." (Emphasis supplied) (App. A, infra, p. 5a)

(4) "The evidence as a whole establishes beyond reasonable challenge that the corporation United Security Life, by the loss of the assets in question was damaged in a minimum of $314,794.19." (App. A, infra, p. 6a)

The district court then entered judgments against the individual defendants: either as a court of equity, after rendering findings of fact and conclusions of law; or as a court of law, if the case was triable to a

common law jury, under Civil Rule 50(b) for judgment notwithstanding the verdict.

Appeals were then taken by eight of the thirteen individual defendants.[*] The court of appeals dismissed as to three appellants for failure to proceed, leaving only Respondents Sabo, Pegram, Landoe, DePinto and Duhame. As to these five, the court of appeals, on the first appeal in 1961, reversed the district court and held that a pretrial "merger" of United into Provident Security Life Insurance Company caused plaintiff Gorsuch to lose his standing as a stockholder of United, and United to lose its capacity to be sued as the indispensable party defendant; and remanded the case to the district court for the joinder of Provident and the entry by the district court of substituted or supplemental findings of fact as to certain matters. In so ordering, the court of appeals first gave the district court discretion to reopen the case for the taking of further evidence, and then stated that "*based* upon the *original* record herein and upon such further proceedings *as to the trial court may seem appropriate, substituted* or supplemental *findings of fact* and conclusions of law *may be entered*, followed by a judgment." (Emphasis supplied)

The joinder of Provident was accomplished by the intervention of Albert J. Doig, a stockholder of Provident and citizen of California, as plaintiff, and the adding of Provident as a defendant, despite the efforts of Provident to intervene as a plaintiff. (R. 1492).

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[*] The district court rejected Provident's efforts to be a plaintiff after the first appeal, finding as fact that Provident's "complaint" had been prepared by counsel for Respondent DePinto, that said complaint exculpated DePinto, and that Provident failed to resist DePinto's motion to dismiss its complaint.

After further hearings, in accordance with the mandate of the court of appeals, the district court, sitting without a jury, made the further findings of fact and conclusions of law required by the court of appeals (R. 1712-1743), and again entered judgments against Respondents in the same amount as the prior judgments, to-wit $314,794.19, but this time in favor of Provident instead of United.

Following a second appeal taken by Respondents, the court of appeals again reversed.

In its second judgment of reversal, to which this Petition is addressed, the court of appeals held that Respondents had been deprived of a Seventh Amendment jury trial at the original trial held during March of 1960.[1] In addition, the court of appeals held, *without reviewing the evidence*, so far as its opinion discloses, that the district court was "without power" to grant plaintiff's motion for judgment notwithstanding the verdict, in accordance with his prior motion for a directed verdict, under Civil Rule 50(b), where the jury had returned a lesser verdict as to Sabo, Pegram, and Landoe, and had discharged DePinto and Dubame.

Petitioners seek a review of both holdings.

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[1] In short, the Ninth Circuit, on its first reversal, granted the district court discretion to take further evidence and enter substituted findings of fact based on such further evidence and the original record. On the second appeal, the court of appeals then reversed the second judgment of the district court, stating that Respondents had been deprived of a Seventh Amendment right to jury trial at the March, 1960 trial, although the jury trial arguments were presented to it on the first appeal.

REASONS FOR GRANTING THE WRIT

The second reversal of the district court by the court of appeals is based on two holdings:

(1) A defendant in a stockholder's derivative action is entitled to a jury trial under the Seventh Amendment as to any claim which, *if* it had been asserted in a direct action by the corporation, would be cognizable in a suit at common law.

(2) The Seventh Amendment and the principles of additur, as the latter have been enunciated by this Court, prohibit a district court, despite the provisions of Civil Rule 50(b), from granting a plaintiff's motion for judgment notwithstanding the verdict, where the jury has returned a lesser verdict or has discharged the defendant, even though there is no triable issue of fact as to defendants' liability or the amount of damages.

Insofar as Petitioners have been able to ascertain, each of the above holdings is unique and novel.

Under the rationale of the first holding above, a party—at least a defendant—is constitutionally entitled to a jury trial in any action which formerly would have been within the concurrent jurisdiction of equity because the remedy at law was inadequate, and also, as in the case at bar, where equity's jurisdiction was exclusive since the common law gave no remedy.

But the court of appeals' rationale does not stop there. Under it the Seventh Amendment applies to proceedings in bankruptcy and in admiralty and gives a constitutional right of jury trial as to issues in bankruptcy and in admiralty which would be triable in a common law suit if the debtor were not in bankruptcy or the proceeding were not in admiralty.

Since each of the holdings of the court of appeals is based on an interpretation of the Seventh Amendment, only this Court can settle the issues involved.

This Court should now review the judgment since it raises far reaching issues as to court or jury trials in the federal courts; rejects the settled course of precedent; erroneously interprets the Seventh Amendment and the effect of the Federal Rules on jury trial; misconstrues this Court's decisions in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500; *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469; *Meeker* v. *Ambassador Oil Corporation*, — U.S. — (Case No. 46, decided Dec. 2, 1963); and *Dimick* v. *Schiedt*, 293 U.S. 474; creates a conflict among the circuits; and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

More specifically the reasons for granting the writ are as follows.

I

THERE IS NO COMMON LAW RIGHT TO A JURY TRIAL IN A STOCKHOLDER'S DERIVATIVE ACTION UNDER THE SEVENTH AMENDMENT, THE FEDERAL RULES, OR STATUTE. THE REASONING OF THE COURT OF APPEALS WOULD GIVE A CONSTITUTIONAL RIGHT TO JURY TRIAL IN ALL ACTIONS WITHIN EQUITY'S CONCURRENT JURISDICTION, AND AS TO MANY ISSUES IN BANKRUPTCY AND ADMIRALTY. THIS ENLARGEMENT IS BELIEVED TO BE UNWARRANTED, BUT IF IT IS TO BE THE RULE, IT SHOULD BE SANCTIONED BY THIS COURT ONLY AFTER FULL CONSIDERATION.

The court of appeals no longer construes the Seventh Amendment as applying only to "suits at common law." It has ruled that, for purposes of determining the right to jury trial preserved by the Seventh Amendment, a stockholder's derivative suit is a

"suit at common law" in the Seventh Amendment sense with respect to any claims in such equitable action which, *if* they had been asserted in a direct action by the corporation, would be cognizable in a suit at common law. In so doing the court of appeals has relied on the "authority" of the Federal Rules of Civil Procedure to enlarge the scope of jury trials reserved by the Seventh Amendment. This is error as shown by the background and history of the Seventh Amendment;[5] by the history of stockholder derivative actions in this Court;[6] and by the effect of the Federal Rules on the right to jury trial.

1. The Seventh Amendment Preserves a Jury Trial Only in Suits at Common Law

While the Sixth Amendment grants a jury trial in "all" criminal prosecutions, the range of the Seventh Amendment in civil actions is much narrower. It confers no right of jury trial, but simply states that:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved, . . ."

Since *United States* v. *Wonson* (CC D Mass 1812) 28 Fed. Cas. 745, 750 (No. 16,750) it has been held that the common law alluded to was the common law of England in 1791,[7] and the stockholder's derivative suit

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[5] 5 Moore, Federal Practice § 38.08 [5] at 70-92.

[6] Prunty, *The Shareholders' Derivative Suit: Notes On Its Derivation*, 32 N.Y.U.L. Rev. 980 (1957).

[7] Parsons v. Bedford, 28 U.S. (3 Pet.) 433; Capital Traction v. Hof, 174 U.S. 1, 22-23; Sloenin v. New York Life Ins. Co., 228 U.S. 364, 377; Baltimore & Carolina Line, Inc v. Redman, 295 U.S. 654, 657.

was not entertained in England until 1828[8] nor in America until 1831.[9] Consequently, regardless of the nature of the action (whether equitable or legal), since it did not exist in England in 1791, it could not have been one of those suits in which a jury trial was preserved by the Seventh Amendment. More importantly, in both countries, the stockholder's derivative action was equitable both in origin and nature, being unknown to the common law and purely an invention of equity.[10] Therefore, even if the Seventh Amendment is interpreted to include "newly created rights of a legal nature, which would under common law principles, be enforced in a suit at common law",[11] the stockholder's derivative action would still not fall within the scope of the Seventh Amendment because it is not a newly created right of a legal nature nor is it enforced in a suit at common law under common law principles.[12]

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[8] Hichens v. Congreve, 1 Russ. & M. 150, 39 Eng. Rep. (Ch. 1828); Prunty, *The Shareholders' Derivative Suit: Notes On Its Derivation*, 32 N.Y.U. L. Rev. 980, 982 (1957).

[9] Taylor v. Miami Exporting Co., 5 Ohio 162 (1831); Prunty, *The Shareholders' Derivative Suit: Notes On Its Derivation*, 32 N.Y.U.L. Rev. 980, 988 (1957).

[10] Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522; United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 264; 2 Hornstein, Corp. Law & Practice § 711 at 190, 191.

[11] Olearchick v. American Steel Foundaries (WD Pa. 1947) 73 F. Supp. 273.

[12] Liken v. Shaffer, (DC ND Iowa) 64 F. Supp. 432, 441.

2. The Stockholder's Suit Is Solely An Invention of Equity And Not Within the Seventh Amendment

Beginning over a century ago in the 1856 case of *Dodge* v. *Woolsey*, 18 How. 331, this Court has entertained, nurtured, and regulated the stockholder's derivative suit as an action solely in equity.[13] Equity Rule 94, adopted in 1882, and Rule 27, of the Equity Rules of 1912, were adopted to regulate such actions.[14] And there was never any doubt that if an action was properly in equity, the parties were not entitled to a jury trial under the Seventh Amendment.[15] In fact, the rule was so firmly established that in *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, a stockholder's derivative action seeking treble damages under the Sherman Act was dismissed, because otherwise the defendants would have been denied their statutory right to a jury trial granted by the Sherman Act. Later in *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 262, in commenting on *Fleitman*, this Court stated that such dismissal "affords no reason for assuming that the long settled rule under which stockholders may seek relief *only* in a court of equity will be departed from . . ." (Emphasis supplied)

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[13] Hawes v. Oakland, 104 U.S. 450, 460; United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 262; Meyer v. Fleming, 327 U.S. 161, 167; Koster v. Lumbermens Mut. Cas. Co., 320 U.S. 518.

[14] 3 Moore, Federal Practice § 23.15(1) at 3489-3490.

[15] Shields v. Thomas, 18 How. 253; Barton v. Barbour, 104 U.S. 126; Cates v. Allen, 149 U.S. 451.

3. The Federal Rules Neither Enlarged Nor Abridged Jury Trial, and There Is No Statutory Right in a Stockholder's Derivative Action

It was in this context then that the Federal Rules of Civil Procedure were promulgated in 1937. Civil Rule 23(b), derived from the above mentioned Equity Rules 94 and 27, was adopted to regulate stockholder's derivative suits.[16]

When the Congress delegated to this Court the responsibility to promulgate Federal Rules, it declared that:[17]

> "Such rules shall . . . preserve the right of trial by jury . . . as declared by the Seventh Amendment."

This the Federal Rules faithfully do. Rule 38 (a) provides:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved inviolate."

The Federal Rules neither expanded nor restricted a constitutional or statutory right to jury trial.[18] The

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[16] Rule 23(b) is "the culmination of two previous attempts to regulate the institution of derivative shareholders' actions in federal courts." 3 Moore, Federal Practice § 25.15(1) at 3489-3490.

[17] 28 U.S.C. §2072; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, fnt. 16.

[18] 2 B Barron & Holtzoff, Federal Practice & Procedure §871 at 9: "It is true that the procedural differences between law and equity are abolished by the rules, but for purposes of determining the right to jury trial, differences between legal and equitable rights and remedies are preserved."; 5 Moore, Federal Practice § 38.12(1) at 125-126: "The Federal Rules contain no affirmative grant of jury trial; they neither enlarge nor abridge the right."

court of appeals conceded that there was no federal statutory right to jury trial in a stockholder's derivative action.[19]

4. This Court's Decisions Under the Federal Rules Have Preserved Jury Trial Without Enlarging the Scope of the Seventh Amendment

The court of appeals ruled that "since the promulgation of the Federal Rules of Civil Procedure," the parties in such suits are entitled to a Seventh Amendment jury trial if any claims in such equitable action are "of a kind which, if asserted by the corporation, would be cognizable in a suit at common law." The court of appeals implied that *Beacon Theatres* and *Dairy Queen*, *supra*, required such a ruling. But in both of these cases this Court applied the Federal Rules to actions that embraced both equitable and common law causes of action in such a way as to preserve the right of jury trial as to the latter; and did not enlarge the scope of the Seventh Amendment to embrace an action which was an invention of equity and which still remains unknown to the common law.

In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, which was not a stockholder's derivative suit, the question was whether, under the claimed authority of Civil Rules 42(b) and 57, a defendant who had interposed a compulsory counterclaim for treble damages under the Sherman Act against a plaintiff who had sought relief under the Declaratory Judgment Act could be deprived of its statutory right to a jury trial by an early hear-

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[19] "There is no applicable statute providing for a jury trial in a stockholder's derivative action. It follows that appellants were entitled to a jury trial *only* if this is a suit 'at common law' in the Seventh Amendment sense." Appendix B, infra, p. 22a.

ing of the equitable issues. The holding, as stated in *Dairy Queen*, 369 U.S. 469,

> ". . . was that where both legal and equitable issues are presented in a single case, only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can *the right to a jury trial* of legal issues *be lost* through the *prior determination* of equitable claims." (Emphasis supplied)

That is, this Court gave effect to directions of Congress and Rule 38(a) that the Federal Rules neither expand nor restrict the right to jury trial. *Beacon Theatres* declared that the decision was consistent with the plan of the Federal Rules to effect substantial procedural reform "while retaining a distinction between jury and nonjury issues." In short, *Beacon Theatres* did not create a Seventh Amendment right to jury trial where none had existed before. It simply protected a statutory right to jury trial from being lost through misuse of the Federal Rules.

And again in *Dairy Queen*, this Court preserved a right to jury trial, which had existed prior to the adoption of the Federal Rules. It held that a defendant's right to a jury trial, in a suit to collect a debt arising from breach of contract, could not be avoided by plaintiff's artful pleading. Plaintiff had cast the complaint for monetary relief in terms of an accounting rather than an action for debt or damages. And this Court rejected the district court's conclusion that the action was "purely equitable."

But in the instant case there was no artful pleading by Petitioners casting a legal cause of action in terms of an equitable cause. This stockholder's derivative

action was the only action available, where, as here, a corporation either refuses to bring a direct action against the defendants or is in the hostile and antagonistic hands of the defendants. There is no legal cause of action, which plaintiff could have brought to recover for United the losses sustained by it. That is why the stockholder's derivative suit was invented by equity. There was no adequate remedy at law. Indeed, there was and is no remedy at law. And if it can be said, in a factual sense only, that defendants have been deprived of a jury trial, it is not because plaintiff could have brought a legal action to recover for United, which he has by artful pleading cast in terms of an equitable action. Rather, such a result is caused by defendants' control of United. Thus, the stockholder's derivative suit—an action known only to equity—was plaintiff's only remedy.

Nor is the court of appeals' decision sustained by *Mecker v. Ambassador Oil Corp.*, — U.S. —, (Case No. 46, Dec. 2, 1963). Again, an issue was whether the district court should determine an equitable cause of action first and thereby deprive plaintiffs of a jury trial on their legal claim. Additionally, there was an issue whether, in view of the joinder provisions of the Federal Rules and the existence of the Declaratory Judgment Act, there is any need for the equitable remedy of quia timet, and, if not, is plaintiff entitled to a jury trial in an action to determine legal title to land under the Declaratory Judgment Act. Citing *Beacon Theatres* and *Dairy Queen*, this Court, per curiam, reversed the ruling that plaintiffs had not been deprived of a jury trial.

Neither situation exists here. First, the district court did not determine an equitable cause of action

ahead of a legal claim, because the cause of action was solely equitable. Second, neither the joinder provisions of the Federal Rules nor the Declaratory Judgment Act provide an alternative legal cause of action to the plaintiff, in a stockholder's derivative action, under which relief can be obtained for the corporation against wrongdoing officers and directors for losses caused by the latter.

The holding of the court of appeals is not only *contra* to the foregoing decisions of this Court, the Federal Rules, and the directions of Congress when it delegated to this Court the formulation of the Federal Rules, but it is also contradicted by the reasoning of state decisions,[20] texts and treatises,[21] and law reviews.[22]

And since the Tenth Circuit held in *Amon* v. *Black*, 234 F. 2d 12, 31 (10th Cir. 1956) that "unless otherwise provided by statute a stockholder's derivative action is always one in equity," a conflict between the circuits was created by the Ninth Circuit's decision that a stockholder's derivative action is a "suit at common law in the Seventh Amendment sense."[3] Also, in

[20] Steinway v. Griffith Consolidated Theatres, . . . Okla. . . . , 273 P. 2d 872; Neff v. Barber, 165 Wis. 503, 162 N.W. 667.

[21] 2 B. Barron & Holtzoff, Federal Practice & Procedure § 871 at 9, fnt. 12; 13 Fletcher, Cyclopedia of Corporations § 5931 at 402 (1961 Revised Edition): "An action by individual stockholders making the corporation a party defendant is equitable in nature, and plaintiffs are not entitled to a jury trial as a matter of right"; 2 Hornstein, Corporation Law & Practice, Derivative Suits, § 730 at 245: "The judge, without a jury, tries the case on the merits."

[22] Developments In The Law, Multiparty Litigation In The Federal Courts, 71 Harv. L. Rev. 877, 944-945 (1957-1958).

Fitzpatrick v. *Sun Life Assurance Co. of Canada*, DC N. J. 1941, (not, though, a stockholder's derivative suit), the rule for determining the right to jury trial was stated as follows:

> "If the cause of action is legal in its nature and formerly remediable in a court of law, the right of trial by jury cannot be denied; if however, the cause of action is equitable in its nature and formerly remediable in a court of equity, trial by jury should not be allowed. The common law distinction between the province of the jury and that of the court remains intact . . ." (Emphasis supplied)

Such a statement of the rule[23] conflicts with that stated by the Ninth Circuit.

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[23] 5 Moore, Federal Practice s. 38.11(6) at 116: "Just as the common law forms of action serve as guideposts in determining what issues in the civil action are historically legal and therefore triable to a jury if a timely demand therefor is made, causes of action that were historically equitable serve to determine what issues are triable by the court. Or stating the latter proposition somewhat differently, court issues are those which prior to the Rules would have been presented in an action properly commenced on the equity side of the court or, after the Law and Equity Act of 1915, properly interposed as an equitable defense or counterclaim in an action on the law side of the court." In Clark and Moore, A New Federal Civil Procedure—II. Pleadings and Parties, 44 Yale L. J. 1291-1299, it was submitted that the right to jury trial "should not depend on matters essentially of nomenclature only, but on the historical method of trying the particular issue. That is the right safeguarded by the Constitution, no more and no less."

5. The Reasoning of the Court of Appeals Enlarges the Scope of the Seventh Amendment To Include Actions Within Equity's Concurrent Jurisdiction, Bankruptcy Proceedings, and Suits In Admiralty

The Ninth Circuit's rationale extends the scope of the Seventh Amendment to include all actions within equity's concurrent jurisdiction, for all of these suits include issues that could be framed in a common law suit but are properly within an equitable action because the remedy at law is inadequate.

The court's holding, though, does not stop at this point. The court extended the constitutional right of jury trial to a stockholder's derivative action, which was within equity's exclusive jurisdiction since the common law afforded the aggrieved stockholder no remedy.

And the court's rationale extends the Seventh Amendment to bankruptcy proceedings and suits in admiralty.

For example, the allowance or disallowance of claims in ordinary bankruptcy, now within the court's summary jurisdiction and subject to adjudication without a jury, would involve a Seventh Amendment jury trial whenever the claim is "legal", i.e., would be framed in a suit at common law if the debtor were not in bankruptcy. Similarly, a right to jury trial would arise in reclamation proceedings (comparable to a common law action of detinue or replevin), where petitioner asserts legal title or possessory interest. Conversely, there would be a Constitutional right in turnover proceedings involving legal interests in property, for these, too, are like detinue and replevin. See *Maggio* v. *Zeitz*, 333 U.S. 56, 63.

At what time did this great burgeoning of the Seventh Amendment occur? When the Federal Civil Rules were made generally applicable to bankruptcy proceedings in 1938 by General Order 37?

An analysis comparable to the foregoing is applicable to suits in admiralty. The issues involved in a libel in personam to recover damages for tort or breach of contract can be framed in a common law action and brought by virtue of the saving to suitors clause. And a libel in rem will usually involve "legal" issues, although the common law is not competent to give the in rem remedy. If the rationale of the Ninth Circuit does not yet extend the Seventh Amendment to suits in admiralty, inasmuch as the Federal Civil Rules are presently inapplicable in admiralty, it would carry to that extent on the union of the civil and admiralty procedures.

6. If There Is To Be Enlargement of the Right To Jury Trial, It Should Be Done By Congress Rather Than the Lower Federal Courts Misconstruing the Seventh Amendment

The scope of the Seventh Amendment should not be enlarged.[21] Aside, possibly, from the more simple tort and contract claims traditionally tried to a jury, a non-jury trial in the district court is more expeditious and cheaper. These considerations are, of course, irrelevant when a constitutional right to jury trial exists and is not waived. They are, however, highly relevant when deciding whether to enlarge the scope of the Seventh Amendment.

If the right to jury trial is to be enlarged, we believe, with deference, that it should be by Congress

[21] Frank, Courts On Trial (1949).

rather than by the lower federal courts, for the statutory method is far more flexible than judicial enlargement of the Seventh Amendment.

If, however, the rule is to be that the parties in a stockholder's derivative action are entitled to a common law jury trial under the Seventh Amendment, then it should be sanctioned by this Court only after a full consideration of both the law and effects of such a rule.

II

NEITHER THE SEVENTH AMENDMENT NOR THE PRINCIPLES OF ADDITUR PREVENT A DISTRICT COURT FROM GRANTING PLAINTIFF JUDGMENT UNDER CIVIL RULE 50(b) WHERE THERE IS NO GENUINE FACTUAL ISSUE AS TO DEFENDANTS' LIABILITY OR THE AMOUNT OF DAMAGES. THIS RULE APPLIES EVEN THOUGH A JURY HAS RETURNED A LESSER VERDICT OR HAS DISCHARGED THE DEFENDANTS.

When the court of appeals reversed the district court for granting plaintiff's motion for judgment n.o.v. under Civil Rule 50(b), it did not rest reversal on a finding that there had been a genuine factual issue as to defendants' liability or the amount of damages for the jury to determine. Rather, it held that the district court is "without power," despite the authority of Civil Rule 50(b), to enter judgment n.o.v. for a plaintiff, where the jury verdicts are for a lesser amount than the judgment entered or discharge a defendant. This holding was based on a citation to *Dimick* v. *Schiedt*, 293 U.S. 474, and a conclusion that "the reasoning which forbids additur just as clearly forbids" the granting of judgment n.o.v. in such circumstances.

Dimick does not so restrict Civil Rule 50(b). In *Dimick*, a genuine factual issue as to damages existing:

plaintiff moved for a new trial on the ground that the verdict was inadequate and against the weight of the evidence. *Dimick* did not involve a motion for a directed verdict and motion for judgment n.o.v., where plaintiff claimed and the district court ruled that there was no genuine issue of fact as to both damages and liability. The principles of additur are pertinent only where there is a triable issue of fact as to damages for the jury to decide.

Consequently:

> "Although additur is an unconstitutional condition, where the damages are at large, and the court is there limited to granting a new trial where the verdict is inadequate, where the court is satisfied that the issue of liability has been properly determined in favor of plaintiff and it could, therefore, limit the new trial to the issue of damages, but there is no genuine factual issue as to recoverable damages, the court has the power to order judgment for the amount of the recoverable damages."[25]

And:

> "Similar to the position taken with respect to excessive verdicts, where the court is satisfied that the verdict establishing liability is proper but that the award of damages is inadequate, and there is no genuine factual issue as to the amount of recoverable damages, the court may order that judgment be entered for that amount, although this is in excess of the verdict."[26]

The reason such procedure does not violate the rule against additur is because, by hypothesis, there is no

[25] 6 Moore, Federal Practice § 59.05 (3) at 3715.

[26] 6 Moore, Federal Practice § 59.05 (4) at 3775.

issue of damages to be tried by the jury; and the court is in effect granting summary judgment as to damages, which it may properly do.[27]

Thus the court of appeals must, when reviewing a judgment n.o.v., examine the state of the evidence; and, prior to reversal, rule as to whether the district court erred in finding that there was no genuine factual issue as to defendants' liability and the amount of the damages. It cannot properly reverse by holding, as it did here, that "we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts."

Furthermore, a review by the court of appeals is necessary as to the district court's ruling on both liability and damages. If the district court was correct in finding that there was no genuine issue of fact as to defendants' liability, but erred in deciding that the amount of damages was ascertainable as a matter of law, why, under the Federal Rules, should a district court, following remand, be required to spend eight days retrying the liability issue when the damage issue can be heard in four hours? Rule 59 and *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, authorize limiting a new trial, when one is required, to the issue of damages where there is no genuine issue of fact respecting defendants' liability.

The decision of the court of appeals respecting the scope of judgments n.o.v. is contradicted by the express language of Civil Rule 50(b) and *Berry* v. *United States*, 312 U.S. 450, 452. *Berry* stated that "Rule 50(b) goes further than the old practice in that

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[27] 6 Moore, Federal Practice § 59.08(4), at 67, at 3804-3805; § 56.12 at 2088-2089; § 56.17(18) at 2203; § 56.18 at 2291.

district judges, under certain circumstances, are expressly declared to have the right . . . to enter judgment *contrary* to the jury's verdict *without granting a new trial.*" (Emphasis supplied)

Also the court of appeals' decision on this point has created a conflict between the circuits. In *Mutual Benefit Health & Accident Ass'n v. Thomas*, 123 F. 2d 353, 355, 356 (C.A. 8th, 1941), a jury verdict for $1,750 was increased substantially by the district court after a post verdict motion by plaintiff. However, plaintiff had not filed a motion for a directed verdict, and the court of appeals therefore reversed holding that *except* for remittitur and the case of "reservation of decision on motion for a directed verdict as provided by Rule 50(b) . . ., or the granting of a new trial, the verdict of the jury must be accepted as conclusive." Implicit in such language is the conclusion that had the plaintiff moved for a directed verdict first, as was done here, the district court would have had the power to enter a judgment larger than the jury's verdict. This conclusion is further buttressed by the Eighth Circuit's statements explaining that the Seventh Amendment permits a re-examination of the facts tried by a jury "according to the rules of common law," and one of the modes known to the common law to so re-examine is the granting of a motion for a directed verdict.

The holding of the court of appeals herein erroneously limits the scope of directed verdicts and judgments n.o.v., impedes the efficient and prompt disposition of civil litigation in the federal courts, compels a district court either to rule on a motion for directed verdict before sending the case to the jury or risk losing its power to do so after a jury verdict, and mechan-

ically freezes federal trial procedure in a wasteful mould which Civil Rule 50(b) was designed to eliminate. The practice of requiring second and third trials where there is no genuine issue of fact regarding defendants' liability or the amount of damages has no place in the trial procedure envisioned by the Federal Rules.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civil 2974
Phoenix

JOHN S. GORSUCH, on Behalf of Himself and All Other Shareholders of United Security Life, *Plaintiff*,

v.

UNITED SECURITY LIFE, and JAMES E. KELLY, L. N. KELLY, PATRICK KELLY, NINA DUNN, J. L. JENKINS, ANGUS A. DE PINTO, ELMER W. DUHAME, AMERICAN SECURITY INVESTMENT CO., ROSLYN B. CROYDON, VERNON E. NIESZ, JOHN BALLANTYNE, EDWIN B. PEGRAM, and UNITED FINANCE CORP., *Defendants*.

Memorandum Decision

With exceptions to be noted, neither of the verdicts in this case, general or special has any reasonable or logical relationship to any conceivable combination of facts supported by the evidence or to any principle of law applicable to the case. It is impossible to discern any rational basis for these verdicts, in fact or in law, either as to the amount awarded plaintiff, or as to the defendants found liable whether considered in relation to plaintiff or in relation to defendants found not liable. In these circumstances, not only are the verdicts against the weight of the evidence but they are not supported by any evidence whatever and they are not justified by any applicable legal principle. To give effect to such verdicts would result in: (1) substantial injustice to the shareholders and policy holders of United Security Life and (2) unjust discrimination against those defendants found liable in

contrast to those favored by the jury although each was substantially culpable in breach of fiduciary duty and negligence proximately contributing to causing damage greatly in excess of the amount specified in the general verdict. In federal practice the trial judge not only has the authority to set aside verdicts of the character described but it is his affirmative and positive duty to do so, whether or not the case be triable by jury as a matter of right. Accordingly, except for the findings of the special verdict with respect of fraud and unjust enrichment, each and both of the general and special verdicts must be and hereby are set aside and given no effect.

The special verdict on the fraud issue is consistent with credible evidence and applicable law and will be accepted by the Court as a finding of fact. Therefore, it is found and held that fraud has not been established by clear and convincing evidence as to any of the defendants referred to in the special verdict on that subject. While the claim of unjust enrichment presents a considerably closer question, the special verdict on that subject conceivably can be found supported in the evidence and is accepted by the Court as a finding of fact.

All of the foregoing is applicable and will be found and held as stated, irrespective of whether or not the verdicts ultimately be held merely advisory.

Originally, plaintiff formally requested jury trial, which request was specifically withdrawn in December, 1959.[1] There is no record of any request for jury trial by any defendant in the case prior to plaintiff's withdrawal of such request, nor has any formal request for jury trial been filed by any defendant since plaintiff's withdrawal of jury request. Shortly prior to trial plaintiff served

[1] Minute entry on proceedings before Judge Ling December 23, 1959:

"Counsel for plfs. waive jury and counsel for certain defs. request additional time to consider matter of waiving jury. Mr. Flynn states deft. Duhame will waive jury."

and filed a motion to strike trial by jury, which motion was resisted by the defendants as to whom jury trial was had. The motion was argued to the trial judge a few days before trial commenced. In denying the motion, the Court expressed doubt that the case was triable by jury as a matter of right and specifically reserved final ruling on the question for a later time, ordering that a jury would be empaneled and participate in the trial but that the jury verdict would be regarded by the Court as merely advisory in the event that plaintiff's motion to strike jury trial as a matter of right ultimately be sustained. Said motion is now hereby granted and sustained. Accordingly, the jury verdict will be treated as merely advisory and will be followed and accepted by the Court only as to the fraud and unjust enrichment issues. The basis of this ruling may be briefly stated as follows:

Under federal rules and procedure, determination of the right to jury trial depends upon whether the issues to be tried are cognizable in law or in equity. In such determination the traditional and generally accepted principles and rules defining and distinguishing between actions in law and proceedings in equity are applied. 2 Fed. Practice and Procedure, Barron and Holtzoff 573. From their earliest recognition, stockholders' derivative actions have been regarded and treated as sounding in equity and not as actions at law. Stevens, Corporations, p. 666 (1936 ed.). Ballantine, Corporations, p. 341 (1946 rev. ed.). The present suit is solely and only a stockholders' derivative action. Therefore, as a proceeding basically if not solely in equity, the case was not triable by jury as a matter of right to any of the defendants now demanding same. Empanelling of a jury for advisory purposes is purely a matter within the discretion of the trial judge who may discharge the jury at any stage of the proceedings, or decline to follow an advisory verdict in any or all particulars after the same is returned. Hargrove v. American Center Ins. Co., 125 F. 2d 225 (10th Cir., 1942), Greenwood

v. Greenwood, 234 F. 2d 276 (3rd Cir. 1956). The effect to be given to the general and special verdicts in this particular instance has already been stated.

If, in a diversity case, trial by jury be deemed a matter of substantive law determined by the law of the state, as distinguished from a matter of practice and procedure controlled by federal statutes, rules and decisions, the result is the same. Such is the plain implication of Alger v. Brighter Days Min. Corp., 63 Ariz. 135 (1945). No Arizona decision tending to the contrary has been found. Apparently the specific question has not been directly passed on by the Supreme Court of Arizona.

The several motions by plaintiff and by defendants for directed verdict submitted at the close of the evidence will now be considered. Each and all of said motions were denied with specific reservation of further consideration thereof and ruling thereon as provided by Federal Civil Rule 50(b). On full study of the record since the trial and on the presentation made by counsel for all parties on the motions for judgment notwithstanding the verdicts, I am fully satisfied that the motion for directed verdict of plaintiff should be granted and each and all of defendants' motions for directed verdict should be denied. It is so ordered and exceptions allowed. Such decision has been reached and made with full recognition of the limitations on action by the Court with respect of motions for directed verdict or for judgment notwithstanding verdict as well stated in MacKay v. Costigan, 179 F. 2d 125, (7th Cir. 1950); Sivert v. Pennsylvania R. Co., 197 F. 2d 371 (7th Cir. 1952).

The basis of the decision may be briefly stated as follows: Whether or not on timely request the case be triable by jury as a matter of right, in my opinion there was no substantial issue of fact raised by the evidence or supported by any principle of law whereby any of the defendants De Pinto, Duhame, Niesz, Sabo, Pegram and Landoe

can escape a finding of breach of fiduciary duty and negligence proximately causing and contributing to the wrongful loss to United Security Life of corporate assets to the damage of the corporation in a minimum of $314,794.19. In my judgment the evidence overwhelmingly establishes, without a scintilla of evidence to the contrary, that each and all of the individual defendants, including those above named, were grossly negligent in every particular of the duties chargeable to them as corporate directors with respect to the transactions resulting in the loss referred to. Gross negligence is defined as the want of even slight care for the security of the interests of others. The personal testimony of each of the defendants itself condemns him as stated; the evidence as a whole confirms such finding; and there was no substantial evidence raising a fact issue to the contrary. Each of the individual defendants baldfacedly acknowledged either that in effect he was a sham, dummy or figurehead director and or that he took not the slightest concern or precaution whatever, either before October 18, 1956, or long too late thereafter, to investigate the transactions of that date or to see to it that the corporate assets were retained in corporate control until such time as adequate security and consideration for their diversion to defendant Kelly was permitted. In every major responsibility of a director as charged by law, i.e., in attending meetings, examining books and records, making reasonable inquiry concerning important transactions, signing papers only when read and understood, and in requiring satisfactory explanation of dubious transactions involving hazards of great loss to the corporation, each of the individual defendants, in most if not all instances by his own admission, was grossly negligent.

That the negligence of each of the individual defendants proximately caused or proximately contributed to causing the loss of the corporate assets of United Security Life is so plain and clear as to admit of not the slightest

doubt. Had any one of the individual defendants exercised ordinary and reasonable prudence, care and caution for safeguarding the corporate assets and the interests of the shareholders and policyholders, as the law required of him, the diversion of the corporate assets to Kelly could not and would not have occurred. Anyone exercising reasonable care, regardless of business experience or acquaintance with the ways of the world, should and would understand the importance of not permitting over $300,000 of highly sound assets to be transferred out of corporate control without specific positive and reasonably satisfactory guarantees for adequate consideration to the corporation for the transfer of its assets or provision for return thereof to the corporation if such consideration be not promptly forthcoming as and when required. Not any one of the individual defendants even so much as claims to have taken any such precaution. In fact, not any one of the defendants on the witness stand could offer any explanation, either reasonable or otherwise, as to how the corporation was to be adequately secured and reimbursed with respect to the transfer to Kelly of its assets. When finally pinned to this point on interrogation the defendants as witnesses simply could not respond in any intelligible manner, good, bad or indifferent. Mature men, compos mentus, charged with the responsibilities of a director of a public stock corporation, simply cannot escape liability for losses caused by such utter lack of ordinary care and breach of fiduciary duty.

The evidence as a whole establishes beyond reasonable challenge that the corporation United Security Life, by the loss of the assets in question was damaged in a minimum of $314,794.19. Of such assets a total of $166,498.66 was in cash or certificates of bank deposit. Mortgages and bonds with accrued interest thereon were in a total of $60,668.65, which all reasonable inferences from the evidence establish without conflict as the fair and actual mar-

ket value of those assets at the time of their loss. The only remaining item of assets comprising the total above stated was in the form of note and accrued interest thereon totaling $87,626.88 payable by United Finance Corporation to United Security Life. While the evidence as to the fair market value as of October 18, 1956, of this item is not as clear and precise as might be desired, there is no substantial evidence to the contrary of valuation as stated and therefore no issue of fact with respect thereto. As to the value of American Security Investment Company stock, there is no credible substantial evidence showing any material or appreciable value thereof before and after the transaction of October 18, 1956.

If under the evidence a finding of no liability on the part of defendants Duhame and De Pinto be found justified on appeal, a similar finding as to defendants Sabo, Pegram and Landoe is required. In such event it is so ordered.

Decree against defendant American Security Investment Co., a corporation, in default herein, and against United Finance Corporation, as prayed for is directed.

Each and all of the several individual defendants are found and held to be joint tort feasors chargeable with negligence and breach of fiduciary duty proximately causing and contributing to the specified damage to the corporation United Security Life. Contribution between joint tort feasors not being permitted under Arizona law, the cross-claims between the several defendants are dismissed, excepting only the cross-claim of defendants Sabo, Pegram and Landoe against defendant Niesz. Claimants in that cross-claim are allowed ten days from date hereof within which to serve and file a response to the memorandum of defendant Niesz supporting his motion to strike said cross-claim.

Considering the character and extent of professional services rendered for plaintiff and the benefits to United Security Life resulting therefrom, in the discretionary judgment of this Court allowance of attorneys' fees and costs is clearly required and justified. It is directed that the decree herein provide for allowance to plaintiff, as and for attorneys' fees and costs to be paid out of any amount or amounts actually recovered by United Security Life based on the decree herein as follows: a sum equal to 15% of such actual recovery plus the total of taxable costs and disbursements actually incurred and expended in prosecution of this litigation to final conclusion.

Counsel for plaintiff is directed to prepare, serve and file proposed findings of fact, conclusions of law and decree conforming to the foregoing decision for presentation to the Court at 10:30 a.m. Monday, April 4, 1960.

Dated at Phoenix, Arizona, this 30th day of March, 1960.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed March 30, 1960.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18,245

Oct. 1, 1963

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO and EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY and JOHN S. GORSUCH and ALBERT J. DOIG, *Appellees*.

Appeals from the United States District Court for the District of Arizona

Opinion

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges. HAMLEY, Circuit Judge:

This suit, in the nature of a stockholders' derivative action, was commenced by John S. Gorsuch, then a stockholder of United Security Life (United), an Arizona stock insurance corporation. Named as defendants in the amended complaint were United, American Security Investment Co. (American), United Finance Corporation, Angus J. DePinto, Hjalmar B. Landoe, Francis I. Sabo, Edwin B. Pegram, Elmer W. Duhame, and the eight other individuals listed in the margin.[1]

The theory of the suit was that, by reason of fraud, negligence and breach of fiduciary duty, unjust enrichment and conversion on the part of the personal defendants,

[1] James E. Kelly, L. N. Kelly, Patrick J. Kelly, Nina Dunn, J. L. Jenkins, Roslyn B. Croydon, Vernon E. Nusz and John D. Ballantyne.

assets of United were diverted from that corporation in connection with its purchase of 30,800 allegdly worthless shares of American.[2]

DePinto, Landoe, Sabo, Pegram, Duhame and several other defendants answered the amended complaint with general denials. DePinto also asserted affirmative defenses of laches and estoppel based upon the merger of United with Provident Securtiy Life Insurance Co. (Provident), another Arizona insurance stock corporation, subsequent to the commencement of the action. Each of the five personal defendants named above also filed cross-claims against other defendants, and Sabo and Pegram filed a derivative cross-claim against several defendants, for the benefit of American.

After a trial with what the district court finally determined to be an advisory jury, the court entered a judgment in favor of United against all of the personal defendants, except Patrick J. Kelly, in amounts ranging from $308,000 to $314,794.19. Niesz, Pegram, Sabo, Landoe, Duhame, DePinto, Ballantyne and Croydon appealed.

We reversed, holding that a merger which United had consummated with Provident after the action had been commenced deprived Gorsuch of standing as a stockholder of United and deprived United of capacity to be sued, and standing as the real party in interest. In our decision, however, we suggested that the lawsuit could be saved by a reconstituting of parties, and remanded the

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[2] In the original complaint, recovery of $308,000 for the benefit of United was sought. In an amended complaint additional claims of $45,514.54 and $109,723.82 were made against some of the defendants. As the pretrial order was framed, recovery in the amount of $214,794.19 was sought from all defendants. In addition, recovery of $39,339.59 was sought from several defendants because of alleged unauthorized expenditures made by United on behalf of defendant James F. Kelly and members of his family.

cause to provide an opportunity for this to be done. *Neisz v. Gorsuch*, 9 Cir., 295 F.2d 909.[2]

Following the remand, Albert J. Doig, a citizen of California who was then a former stockholder of United and a present stockholder of Provident, filed an application for leave to intervene as a plaintiff. He also moved for an order joining Provident as a party defendant. Provident moved to intervene and to be substituted as plaintiff in place of Gorsuch. The court permitted Doig to intervene as a party plaintiff and Provident as an additional party plaintiff.

DePinto, Landoe, Sabo, Pegram and Duhame filed answers to Doig's complaint in intervention and Provident's amended and supplemental complaint in intervention. Each asserted general denials of the essential allegations of these complaints. Duhame and DePinto also advanced certain affirmative defenses, and cross-complained against other defendants, except each other, for contribution. This was on the theory that their liability, if any, was vicarious and secondary to that of the other defendants. Several proposals to amend or supplement the original findings of fact were submitted. Doig moved that Provident be realigned as a party defendant and various other motions were made. A hearing was thereafter had at which evidence was received.

In a memorandum decision and order thereafter entered, the district court realigned Provident as a defendant, holding that it was hostile to the claims asserted on its behalf in this suit. The court dismissed the cross-claims of DePinto and Duhame on the ground that neither of them qualifies as having only secondary liability. The court re-adopted its original findings of fact and reaffirmed its

[2] We also directed that, in the event the cause was re-established by the joinder of indispensable parties, substitute or supplemental findings be entered covering a number of matters concerning which the original findings were deficient.

original decision. It specifically held that DePinto, Landoe, Sabo, Pegram and Duhame had been guilty of gross negligence and that all of them except Landoe breached fiduciary duties in connection with the transaction involving the diversion of United's funds.

Supplemental findings of fact and conclusions were entered, together with a judgment in favor of Provident and against the same twelve personal defendants against which the original judgment had run, in amounts again ranging from $308,000 to $314,749.19. The five defendants last named above have appealed. Both Doig and Provident appear here as appellees, being represented in this court by the same counsel who have filed a joint brief on their behalf.[4]

The first question presented is whether the district court erred in permitting Doig to intervene as a party plaintiff in the remanded proceedings.

Doig sought intervention as a party plaintiff so that the remanded proceeding could continue, as it had been up until then, a secondary action by a shareholder of a corporation. Rule 23(b), Federal Rules of Civil Procedure, provides that the complaint of one who seeks to prosecute

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[4] On the same day that the district court rendered this judgment it also rendered judgment in *Gorsuch v. Provident Security Life Insurance Co.*, in which Gorsuch sought to have the merger between United and Provident declared invalid. The court so held, and concluding therefrom that United is a viable corporation still in existence, ordered Provident to account to United for all of the latter's assets which it had received, together with the income derived therefrom. Provident appealed from that judgment, and we are today deciding that appeal *sub nom. Provident Security Life Insurance Co. v. Gorsuch*, 9 Cir., ... F.2d ..... The judgment of the district court therein is being reversed and the cause is being remanded for further proceedings.

The appeal in a second related case, *Mauser v. United Security Life*, No. 16231 in this court, is being held in abeyance pending final disposition of the instant case, and *Provident v. Gorsuch*. The *Mauser* suit is a secondary action by two policy-holders of United, acting on behalf of United, to recover $314,794.19 from various personal and corporate defendants, and has once before been in this court. See *Mauser v. United Security Life*, 9 Cir., 267 F.2d 3.

such an action shall set forth the efforts of the plaintiff to secure from the corporation the action he desires and the reasons for his failure to obtain such action, "or the reasons for not making such effort."

It is not alleged in Doig's complaint that any demand was made upon Provident to intervene as plaintiff.[5] However, several reasons are stated therein for not making such effort.[6] But appellants argued that these reasons are legally insufficient to warrant Doig's intervention as a party plaintiff.

The courts are in some disagreement as to what reasons will be deemed sufficient to excuse the failure to make a demand for corporate action.[7] While Dunham and Doig cite cases which reflect their respective views as to this,

[5] Doig first filed this application on November 6, 1961. But this was premature as the mandate of this court following the former appeal was not filed until December 11, 1961. On December 14, 1961, Doig moved for leave to withdraw and refile the application, which motion was subsequently granted. Provident filed its motion to intervene and for substitution on February 8, 1962.

[6] The pertinent allegations contained in the complaint in intervention, filed November 6, 1961, and refiled March 8, 1962, read as follows:

"48. Demand by plaintiff Albert J. Doig that the Board of Directors of Provident Security Life Insurance intervene in this action was not made, and would have been futile because the members of the Board of Directors have remained inactive and have not intervened in this action although:

"(a) They have since February 7, 1959, or before had knowledge of the acts herein alleged and complained of.

"(b) They have since November of 1958 had knowledge of the action commenced by plaintiff John S. Gorsuch and since February 7, 1959, known of the continued pendency of this action.

"(c) They have since February 7, 1959, known that the cause of action asserted by plaintiff John S. Gorsuch became an asset of Provident Security Life Insurance Company on the effective date of the merger between United Security Life and Provident Security Life Insurance Company.

"(d) They have since February 7, 1959, known that on the effective date of the aforesaid merger United Security Life ceased to exist, and that thereafter no judgment could be rendered in favor of United Security Life in aforesaid pending cause of action."

[7] The cases are reviewed in 3 Moore's Federal Practice, 2d ed., § 23.1[9], pages 3525-27. Professor Moore believes that "probably the most straightforward approach is to admit frankly that it lies within the sound discretion of the court to determine the necessity for a demand."

we accept, as a fair statement of the rule, this expression in *Cathedral Estates, Inc.* v. *Taft Realty Corp.*, 2 Cir., 228 F.2d 85, 88:

> "... It is clear that under Rule 23(b) and its predecessors a demand need not be made on the directors or shareholders where such a demand would be 'futile,' 'useless,' or 'unavailing,' e.g., Delaware & Hudson Company v. Albany & Susquehanna Railroad Company, 1909, 213 U.S. 435, 29 S.Ct. 540, 53 L.Ed. 862; Hyams v. Calumet & Hecla Mining Co., 6 Cir., 1915, 221 F. 529, 538; Whittaker v. Brietson Mfg. Co., 8 Cir., 1930, 43 F.2d 485, 489; Dana v. Morgan, D.C.S.D.N.Y. 1914, 219 F. 313, 314-15, affirmed 2 Cir., 1916, 232 F. 85; Cohen v. Industrial Finance Corporation, D.C.S.D.N.Y., 1942, 44 F. Supp. 491, 495; 3 Moore's Federal Practice 3525-26. And where the directors and controlling shareholders are antagonistic, adversely interested, or involved in the transaction attacked, a demand on them is presumptively futile and need not be made. ..."

In determining whether the circumstances of this kind exist in a particular case, the normal procedure is to look solely to the allegations of the complaint. But in this case, before acting upon Doig's motion to intervene, the district court received evidence in the form of testimony and exhibits which it considered in determining whether a demand upon Provident to intervene would have been futile.

The court found, on the basis of this evidence and the whole record that counsel for Provident had certain conflicts of interest, there was belated and ineffective concern of Provident in the litigation, a substantial part of Provident's complaint in intervention had been prepared by counsel for an adverse party, and there had been included in this complaint by Provident allegations tending to exculpate an adverse party. In view of these facts the court indicated that it was not satisfied that Provident's application was made in good faith with the bona fide intent

and purpose to continue vigorous prosecution of the litigation for the use and benefit of Provident stockholders.

Considering the complaint as amended to conform to the proof received on this question, we think it amply sustains the conclusions drawn by the district court and sufficiently demonstrates that a demand upon Provident to prosecute the case effectively would have been futile. We therefore hold that the court did not err in permitting Doig to intervene as a party plaintiff under Rule 23(b).[4]

The next question presented as to whether the action is barred by Arizona statutes of limitations. In this connection reliance is placed on A.R.S. § 12-542, providing a two-year limitation, and upon A.R.S. § 12-550, providing a four-year limitation.[5]

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[4] In granting Provident leave to intervene as an additional party plaintiff, the court stated that "[t]he true interest and status in the litigation of Provident will appear from its contentions and conduct in the further proceedings required to accomplish the directive of the Court of Appeals mandate." Tending to confirm the district court's initial appraisal of the bona fides of Provident's position as a plaintiff was the action of the court at the close of the remanded proceedings in realigning Provident as a defendant. The court said, in this connection:

"Since the intervention of Provident Security Life Insurance Company no evidence has been presented nor has any action been taken by Provident or its counsel indicating that Provident, in fact, is or should be treated as a bona fide plaintiff. The court is satisfied the management of Provident is hostile to the claims asserted on behalf of United Security Life Insurance Company and its stockholders, or at very best is apathetic thereto, and does not desire active and effective prosecution of such claims. . . ."

[5] A.R.S. § 12-542 reads in part:

"There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

. . . .

"3. For trespass for injury done to the estate or the property of another.

"4. For taking or carrying away the goods and chattels of another.

"5. For detaining the personal property of another and for converting such property to one's own use. . . ."

A.R.S. § 12-550 reads:

"Actions other than for recovery of real property for which no limitation is otherwise prescribed shall be brought within four years after the cause of action accrues, and not afterward."

The claim accrued on October 18, 1957, when, it is alleged, $314,794.19 in the funds of United were diverted. The original complaint was filed by Gorsuch against United on November 4, 1958, well within two years of the accrual of the claim. But appellant calls attention to the fact that when the merger took place in the spring of 1959, United went out of existence. The Doig and Provident complaints in intervention were not filed until March 8, 1962.[10]

It is argued from these facts that Provident's complaint in intervention introduced a new claim not comprehended within Gorsuch's original complaint, and that the limitations applicable as against Provident run back to the time when the claim originally accrued. Under this view, the action is barred under either the two- or four-year Arizona statutes of limitations. Alternatively, it is argued that even if the Provident complaint did not introduce a new cause of action, Gorsuch's action on behalf of United abated in the spring of 1959 when the merger was consummated, and Provident's complaint, filed three years later, is barred by the two-year Arizona statute of limitations.

We are not concerned with Provident's complaint in intervention, for the district court realigned Provident as a defendant. While appellants argue that this realignment was "meaningless and ineffective," we do not agree. Had Provident intended to make a bona fide attempt to enforce its rights as the successor to United, then the district court could not have realigned that corporation as a defendant. But, as related above, the court found that Provident did not so intend and the record, in our opinion, supports that finding. The district court did not abuse its discretion in realigning Provident as a defendant.

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[10] On that date an order was entered authorizing the filing of the Doig and Provident complaints in intervention. As to the time of filings, see note 7.

Appellants do not appear to argue that Doig's complaint in intervention is barred by the Arizona statutes of limitations, but if they do so argue, it is to no avail. Having intervened as plaintiff in a class action brought by Gorsuch, and having introduced no new cause of action therein, the filing of the Gorsuch complaint inures to his benefit.[11]

As established in *Niesz v. Gorsuch*, 8th Cir., 295 F.2d 909, Gorsuch lost his capacity to sue and United lost its capacity as defendant and its standing as the real party in interest when the merger was consummated. This did not, however, abate the action in the sense that all prior proceedings had gone for naught. It necessitated only reinstatement of the suit by joinder of indispensable parties within a reasonable time, as we ruled in *Niesz* (at page 913).

When an action is reinstated, the effect of the statute of limitations is to be determined by the date the complaint was originally filed, unless the result will be to inject a new claim.[12] As indicated above no new claim was injected in the further proceedings on remand.

We therefore hold that this action is not barred by the Arizona statutes of limitations.

The third question presented is whether appellant were deprived of their constitutional right to trial by jury.

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[11] *See* 4 Moore's Federal Practice, 2d ed., § 24.13[2], pages 100-101. *See* also, *Jeter v. Safir*, 87 Ariz. 229, 57 P.2d 812, 814, which, however, was not a class action. The ruling we have made would not be warranted if the original complaint had been filed in the name of a non-existent plaintiff. See the cases cited in 8 A.L.R.2d at annotation at 57. But even assuming that United was a plaintiff in the original action (it was actually a defendant), it was in existence when Gorsuch brought the action.

[12] *See Zimmerman v. Western Builders' Supply Co.*, 38 Ariz. 91, 297 P. 449, 450-451, *Bryan v. Inspiration Consol. Copper Co.*, 25 Ariz. 541, 295 P. 901, 907-909.

Appellees point out that none of the appellants filed a demand for a jury trial prior to the original trial, and argue from this that they waived trial by jury.[13]

It is provided in Rule 38(d), Federal Rules of Civil Procedure, that the failure of a party to serve such a demand constitutes a waiver of trial by jury. But Rule 38(d) further provides that a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. It follows that failure to demand a trial by jury does not constitute a waiver if such a demand is withheld in reliance upon a demand filed by another party, and if withdrawal of the latter demand is not consented to.

Gorsuch, as plaintiff in the original complaint, filed a timely demand for a jury trial. At a subsequent pre-trial conference Gorsuch sought to withdraw this demand, his counsel stating that they "waive jury trial." Counsel for certain defendants then requested additional time to consider the matter of waiving a jury. The record does not indicate which defendants were represented by this request. In any event there is nothing in the record to indicate that, at that time appellants DePinto, Landoe, Sabo and Pegram consented to the withdrawal of Gorsuch's demand.

However, counsel for Duhame advised the court at that time that Duhame "will waive jury." This constituted a consent by Duhame to the withdrawal of Gorsuch's jury demand. The record does not indicate any action at that time by the trial court with regard to Gorsuch's request to withdraw his demand for a jury. Subsequent events of record indicate, however, that no one regarded the demand as effectively withdrawn at that time as to any of the appellants. As the result of a further pre-trial con-

[13] We find in the record what amounts to a demand by DePinto for a jury trial, made after we remanded the case following the first appeal.

ference held on March 1, 1960, a minute entry was made reciting that all defendants except Duhame "do not waive jury trial at this time."

Later, but prior to trial, Gorsuch moved under Rule 39(a)(2), Federal Rules of Civil Procedure, to require a non-jury trial. This motion was made on the ground that a right to trial by jury does not exist under the Constitution or statutes of the United States in a stockholder's derivative action. All of the appellants resisted the granting of this motion, thus indicating that none of them consented to the withdrawal of Gorsuch's jury demand. As for Duhame, it indicated a change of position from consent to the withdrawal of Gorsuch's demand to refusal to consent.

Since this change of position took place prior to the time the court, as related below, granted Gorsuch's motion for a non-jury trial, we see no reason why it should not be respected. The trial court was apparently in agreement with this view for the jury was instructed that the case was being tried non-jury "as to all defendants other than DePinto, Duhame, Niesz, Pogram, Soldo and Landoe."

We therefore hold that none of the appellants waived trial by jury.

At the time of the argument on the Gorsuch motion the court reserved ruling thereon. At the same time, however, the court announced that a jury would be impaneled, and that the verdict would be deemed advisory if the motion for a non-jury trial were ultimately granted. Accordingly, a jury was duly impaneled and as to all of the appellants and defendant Niesz, the trial proceeded as if it were a normal jury case. The remaining defendants, however, except for Patrick J. Kelly and American, who had failed to appear, had stipulated that as to them the case would

be tried non-jury.[14] At the close of the evidence the court denied the several motions made by appellants and Gorsuch for directed verdicts subject, however, to a later determination of the legal questions raised by these motions, as provided in Rule 50(b), Federal Rules of Civil Procedure.

The jury returned a general verdict in favor of Gorsuch and United and against appellants Sabo, Pegram and Landoe, and defendant Niesz, in the sum of $20,000. Four special verdicts were also returned, as set out in the margin.[15]

In its memorandum decision thereafter entered the district court proceeding on the assumption that appellants

[14] The jury was so informed prior to final arguments at the end of the trial, and again in the court's final instructions. The forms of special verdicts which were given to the jury named only the appellants and Niesz. After the jury retired to deliberate on the verdicts, and after exceptions to instructions had been taken, the trial proceeded for the purpose of receiving additional evidence and a stipulation on the non-jury aspect of the case. Thus, because some defendants had stipulated to a non-jury trial, the court was required to enter findings of fact and conclusions of law dealing with all of the issues of the case, without regard to whether appellants were entitled to a jury trial.

[15] "1. Did the specified defendant, in one or more particulars, proximately causing or contributing to loss and damage to the corporation United Security Life, with respect to transfer of the assets in question, breach a then existing fiduciary duty to said corporation? Defendant Niesz: Yes. Defendant DePinto: No. Defendant Duhame: No. Defendant Sabo: Yes. Defendant Pegram: Yes. Defendant Landoe: Yes.

"2. Was the specified defendant negligent as a director of United Security Life in one or more particulars proximately causing or contributing to loss or damage to said corporation with respect to transfer of the assets in question? Defendant Niesz: Yes. Defendant DePinto: No. Defendant Duhame: No. Defendant Sabo: No. Defendant Pegram: No. Defendant Landoe: Yes.

"3. Do you find the specified defendant to have been unjustly enriched with respect to transfer of the assets in question by funds, assets or other property of United Security Life? Defendant Niesz: No. Defendant Sabo: No. Defendant Landoe: No. Defendant Pegram: No.

"4. Do you find the specified defendant chargeable with fraud in any one or more particulars proximately causing or contributing to loss and damage to United Security Life with respect of transfer of the assets in question? Defendant Niesz: No. Defendant Sabo: No. Defendant Landoe: No. Defendant Pegram: No."

or any of them had a right to trial by jury, denied the motions of Sabo, Pegram and Landoe to set aside the verdicts and enter judgments in their favor. Proceeding on the same assumption, the court granted the motion of Gorsuch to set aside the verdicts and enter judgment for United against each appellant, and defendant Nicsz, in the sum of $314,794.19.[10]

The court further held, however, that actually appellants were not entitled to a jury trial in a stockholder's derivative action. Accordingly, the court, as a part of its memorandum decision, granted the earlier motion of Gorsuch to require a non-jury trial. The court determined that the jury verdict would therefore be treated as advisory only. As already indicated, the court did not accept this advisory verdict except on the issues of unjust enrichment and fraud. Findings of fact and conclusions of law were thereupon entered supporting the judgment for damages against the appellants in the amount of $314,794.19.

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[10] In explanation of this action the court stated, in its memorandum:

> "... It is impossible to discern any rational basis for these verdicts, in fact or in law, either as to the amount awarded plaintiff, or as to the defendants found liable whether considered in relation to plaintiff or in relation to defendants found not liable. In these circumstances, not only are the verdicts against the weight of the evidence but they are not supported by any evidence whatever and they are not justified by any applicable legal principle. To give effect to such verdicts would result in: (1) substantial injustice to the shareholders and policy holders of United Security Life and (2) unjust discrimination against those defendants found liable in contrast to those favored by the jury although each was substantially culpable in breach of fiduciary duty and negligence proximately contributing to causing damage greatly in excess of the amount specified in the general verdict. In federal practice the trial judge not only has the authority to set aside verdicts of the character described, but it is his affirmative and positive duty to do so, whether or not the case be triable by jury as a matter of right. Accordingly, except for the findings of the special verdict with respect of fraud and unjust enrichment, each and both of the general and special verdicts must be and hereby are set aside and given no effect."

The first appeal herein was then taken, during the course of which appellants raised the question that they were deprived of their Constitutional right to a trial by jury. Because of our ruling on that appeal that indispensable parties were absent, we concluded that we could not then decide this jury question or the other substantive questions which were raised on that appeal. The jury question is now properly before us on this second appeal and is to be considered in the light of circumstances as they existed at the time of the first appeal.

Although this is a diversity suit, the right to a jury trial is to be determined as a matter of federal law. *Smiler* v. *Conner*, 372 U.S. 221, 222. In making that determination we also have in mind this admonition by the Supreme Court, announced in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501:

> "... Maintenance of the jury, as a fact-finding body, is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

It is provided in the Seventh Amendment that "(i)n Suits at common law," where the value in controversy shall exceed $20.00, the rights of trial by jury shall be preserved. In Rule 38(a), Federal Rules of Civil Procedure, it is provided that the right of trial by jury as declared by the Seventh Amendment to the Constitution "or as given by a statute of the United States" shall be preserved to the parties inviolate.

There is no applicable statute providing for a jury trial in a stockholder's derivative action. It follows that appellants were entitled to a jury trial only if this is a suit "at common law" in the Seventh Amendment sense.

Arguing that this is such a suit, appellants concede that, in a derivative action, a stockholder must avail himself of

the aid of a court of equity in order to get into court. They argue, in effect, however, that if the right therein sought to be asserted on behalf of the corporation is a legal right and if the remedy sought is monetary damages, it is a right and remedy characteristic of a suit at common law. In this event, appellants urge, the suit ought to be regarded as one at common law insofar as all issues pertaining to this corporate right and remedy are concerned, thereby entitling such a stockholder, or those he sues, to a jury trial as guaranteed by the Seventh Amendment.[7]

Rounding out this argument, appellants contend that the corporate right sought to be asserted by Gorsuch in this particular derivative action is a legal right, and point out that Gorsuch sought only money damages.

Prior to the promulgation of the Federal Rules of Civil Procedure, a court sitting in equity could retain jurisdiction even with regard to legal remedies which became available. *American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215. Consistent with this principle, courts of equity, exercising a jurisdiction separate from courts of law were, in some cases, allowed to enjoin subsequent legal actions between the same parties involving the same controversy. See, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 507.

Thus it may be, although we are not called upon to decide, that prior to the Federal Rules of Civil Procedure, a court exercising equity jurisdiction in determining

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[7] Before developing this argument appellants conceded that there was authority for the proposition that the parties to a stockholder's derivative action are not entitled to a jury trial as a matter of right. They cite *Steinway v. Griffith Consolidated Theatres, ...* Okla. ..... 275 P.2d 872, and cases referred to therein, as exemplifying such authority. *Steinway* and the cases therein cited, however, were concerned with the right to a jury trial in the courts of Oklahoma, in view of certain statutes and constitutional provisions of that state. The Seventh Amendment was not involved and no federal case bearing upon the right to trial by jury was cited. Appellees cite *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667, for the same proposition as *Steinway*. But like *Steinway*, *Neff* was concerned only with the right to a jury trial in state courts.

whether a stockholder had standing to prosecute a derivative action could, in the continued exercise of equity jurisdiction, proceed to determine the substantive questions, thereby precluding a jury trial on any legal issues which might be involved.

But at least since the promulgation of the Federal Rules of Civil Procedure, this principle has not had general application in the federal courts. Under Rules 1, 2 and 18, Federal Rules of Civil Procedure, the same court may try both legal and equitable causes in the same action. *Beacon Theatres, Inc.* v. *Westover*, at page 508. As pointed out in *Beacon*, legal and equitable issues can be tried at the same time, the jury (if one has been demanded), rendering a verdict on the legal issues, and the court rendering a decision on the equitable issues.[17]

Thus, except under most imperative circumstances, a right to a jury trial on legal issues may not now be denied to a federal litigant on the ground that the case reached court only through equity, or because equitable rights are involved, or because the legal issues are "incidental" to the equitable issues,[18] or because substantive equitable

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[17] In *Beacon*, at page 510, the court indicated that a trial court has a limited discretion to order a trial first on the equitable issues, saying:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trial by the court, [17] [17 *See Hargis* v. *Burnett*, 78 U.S. App. D.C. 66, 136 F.2d 796, 798-799; *cf. The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 459-460,] that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial."

[18] In *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, at pages 470-471, it was pointed out that the view that the right to a trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to the equitable issues, has not prevailed since *Scott* v. *Neely*, 140 U.S. 106, was decided in 1891.

remedies are sought, or by the device of trying the equitable issues first.[20]

A stockholder's derivative action is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty. *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522. The aid of equity is needed in order to establish the shareholder's right to sue in the corporate stead. *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 2 Cir., 202 F.2d 731, 734. But the claim set up is that of the corporation.[21]

In order to determine whether appellants were entitled to a jury trial in this derivative action, it is therefore necessary to ascertain whether any of the claims asserted against them on behalf of the corporation are of a kind which, if asserted by the corporation, would be cognizable in a suit at common law. If so, and if the judgment which has been entered, insofar as can be determined rests on claims of that kind, there has been a denial of trial by jury as guaranteed by the Seventh Amendment and appellants have been aggrieved thereby.

Nine counts are set forth in the amended complaint, but only counts VI, VII and VIII involve any of the appellants. The only relief sought against any of the appellants in these counts is money damages. As modified or enlarged by the pre-trial order, the claims against all of the appellants are predicated on fraud, negligence and breach of fiduciary duty. In addition, the claims against all appellants except Duhamel are predicated on conversion and unjust enrichment.

The judgment on appeal is not, as to any of the defendants, based on fraud, unjust enrichment or conversion.

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20 *See Dairy Queen, Inc. v. Wood*, 369 U.S. at 472-473; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511; *Thermo-Stitch, Inc. v. Cheney Bros. Processing Corp.*, 5 Cir., 292 F.2d 486, 488-491.

21 *Koster*, *supra*, at page 522; *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 28.

Therefore none of the appellants is aggrieved because they did not have a jury trial on those issues. One ground for the judgment, applicable to all of the appellants, is gross negligence. Another ground, applicable to all appellants except Landoe, is breach of fiduciary duty.

An action brought by the corporation to recover damages against former officers or directors on the ground of negligence would be cognizable in a suit at common law. *Kelly* v. *Dolan*, 3 Cir., 233 Fed. 635.[28] Thus all appellants were denied a jury trial on an issue cognizable in a suit at common law. Landoe was necessarily aggrieved by this denial since, as to him, this was the only basis of the judgment.

The court having expressly found that none of the appellants was guilty of fraud, the conclusion seems inescapable that the finding that DePinto, Sabo, Pegram and Duhame breached fiduciary duties owed to United actually rests upon a finding of gross negligence. The conclusions of law dealing with the question of breach of fiduciary duty lend support to this view. Directors, it is there stated, are required to discharge their duties with good faith, exercise diligent care and skill, devote reasonable attention to the corporate affairs, take reasonable precautions against neglect and fraud, supervise corporate affairs, attend to the business of the company, avoid acting as figureheads, know what is transpiring. The court con-

[28] In *Electrics*, n. note 21 above, it was held that because such a claim asserted on behalf of the corporation was legal in nature, it could not be maintained for the corporation in a derivative suit, since then the defendant would be denied a jury trial. But later it was pointed out in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, that under the present rules legal and equitable issues can be tried in the same action and that there not only can, but must, be a right of jury trial as to such legal issues. Accordingly, since *Beacon Theatres*, it has been held that a derivative suit will lie to assert a legal right on behalf of a corporation. *Rogers* v. *American Can Company*, 3 Cir., 305 F.2d 297, 307 et seq.; *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F.2d 731, 734. While the legal rights involved in the cited cases relate to violations of the antitrust laws, the underlying principle is applicable whatever the nature of the legal right may be.

cluded that DePinto, Sabo, Pegram and Duhaime were grossly remiss in these respects.

Having in mind the necessity of scrutinizing, with utmost care, any seeming curtailment of the right to a jury trial,[22] we hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is subject to appropriate instructions, a jury question. We therefore conclude that, in the context of this case, the question concerning breach of fiduciary duty, as well as negligence, should have been submitted to the jury.[23]

It follows that, as to all of the appellants, the judgment rests upon issues which appellants were entitled to have submitted to a jury, and upon findings which appellants were entitled to have made by a jury. The trial court therefore erred in ruling that the jury verdicts were advisory only, and in basing the judgment upon court-made findings of fact.

But, as appellees point out, these were alternative rulings and actions. The trial court, proceeding on the alternative assumption that appellants were entitled to a jury trial, set aside the jury verdicts and entered judgment in accordance with plaintiff's motion for a directed verdict.[24] This judgment was granted against each of them in the amount of $314,734.49, notwithstanding the fact that the verdicts exonerated DePinto and Duhaime of all

[22] *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501, quoted above.

[23] It is therefore unnecessary to determine, on the assumption that the question of breach of fiduciary duty is cognizable only in equity, whether the judgments as to DePinto, Sabo, Pegram and Duhaime sufficiently rest thereon so that it can be said that they were not aggrieved by the lack of a jury trial on the negligence issue.

[24] The action is described in note 16 and the associated text of the opinion. This alternative ruling was purportedly pursuant to Rule 50(b), Federal Rules of Civil Procedure.

liability, and as to Sabo, Pegram and Landoe, awarded appellees only $20,000.[26]

Appellees argue that a trial court may so deal with jury verdicts where the evidence warrants such action and that here the record amply supports the action taken by the court. Thus, contend appellees, appellants have no grievance under the Seventh Amendment or otherwise.

Federal practice does not permit the use of additur in cases where the amount of damages is disputed. Thus, if the trial court here, finding the verdict inadequate as to the three appellants against which verdicts were obtained, had granted a motion by plaintiff for a new trial unless defendants would consent to an increase in an amount fixed by the court, and defendants had agreed thereto, denial of plaintiff's motion on that ground would violate the Seventh Amendment.[27]

What the trial court did in the instant case was not additur in the technical sense. There was no motion by plaintiff for a new trial, the trial court did not grant such a motion unless defendants consented to the awards which were actually entered, the defendants did not consent to such awards, and plaintiff is not the party who is complaining about what the court did. But, insofar as the Seventh Amendement right to a trial is concerned, the reasoning which forbids additur just as clearly forbids an unconditional award of damages in excess of a jury verdict in an amount which, although agreeable to plaintiff, is not consented to by defendant.

In the case of additur, the Constitutional right of the plaintiff to a jury trial is brought to an end, while in our

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[26] As to Landoe, the jury finding of liability rested on a special verdict that he had breached a fiduciary duty and had been negligent. As to Sabo and Pegram, the jury finding of liability rested on a special verdict that they had breached their fiduciary duties.

[27] *Dimick v. Schiedt*, 293 U.S. 474; *Silverman v. Travelers Ins. Co.*, 5 Cir., 277 F.2d 257, 264. 6 Moore's Federal Practice, 2d ed., § 59.05[4], pages 3752-3755.

case the Constitutional right of the defendant is likewise terminated. What the court said, in *Dimick*, concerning such an impairment of a plaintiff's right to a jury trial is equally applicable where it is the defendant's right which is impaired.[28]

We therefore hold that the trial court was without power to enlarge the jury awards against Sabo, Pegrain and Landoe, or to make an award against DePinto and Duhame who had escaped any jury award.[29]

The trial court does have power, where the record warrants, to set aside a jury verdict for plaintiff, on the ground that the jury award of damages is inadequate. But when that is done the only recourse is to grant a new trial. Where this procedure is followed, however, the granting of a new trial is not reviewable prior to the second trial, as it is an interlocutory order. See *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 254.[30]

While appellees did not move for a new trial, and the trial court did not purport to grant one, the necessary

[28] The court said in *Dimick* (290 U.S. at 486-487):

"... where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing any additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'"

[29] It is therefore unnecessary to consider whether the trial court also erred in finding appellants DePinto and Duhame liable, the jury having found neither of them liable.

[30] An appeal will lie to determine whether a trial court had jurisdiction to grant a new trial. *Chicago & Northwestern Ry.* v. *Britton*, 8 Cir., 302 F.2d 400, 401-402.

effect of the order setting aside the verdict was, for reasons indicated, to grant a new trial. Accordingly, we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts.

It follows that all questions presented on this appeal pertaining to the evidentiary showing as to negligence of breach of fiduciary duties may not be decided at this time.

There are also certain other questions presented on this appeal.[31] But they are not of a kind which requires decision now in order to provide guidance as to the remanded proceedings. Nor will they be presented here again unless plaintiff prevails in the further proceedings and then only if the judgment is of the same kind as that which is before us on this appeal. If these questions do arise again, they can best be dealt with on the record for that appeal.

The judgment is reversed and the cause is remanded for a new trial.

(Endorsed) Opinion Filed Oct. 1, 1963.

Frank H. Schmid, Clerk.

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[31] We refer to the questions of whether the judgment is excessive as to DePinto and Duhame to the extent of 38.79% because of the cancellation of American's stock held by United; whether the judgment is excessive as to DePinto in the amount of six per cent because of Duhame's ownership of certificates of contingent interest; whether Provident is entitled to six per cent interest on the award from October 18, 1957; and whether DePinto and Duhame are entitled to indemnity against Pegram, Sabo, Landoe and certain other defendants.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18245

ANGUS J. DEPINTO, HJALAMAR B. LANDOE, FRANCIS I. SABO and EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

vs.

PROVIDENT SECURITY LIFE INS. CO. and JOHN S. GORSUCH and ALBERT J. DOIG, *Appellees*.

Judgment

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial.

It is ordered that the taxation of costs on this appeal await the final disposition of the cause and determination of the ultimately prevailing parties.

Filed and entered October 1, 1963, as amended by order of November 14, 1963.

APPENDIX C

Constitution of the United States—Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 50(b), Federal Rules of Civil Procedure:

Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for a judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.